Ministry of Justice

Report on review of ways to reduce distress of victims in trials of sexual violence

March 2014

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Foreword

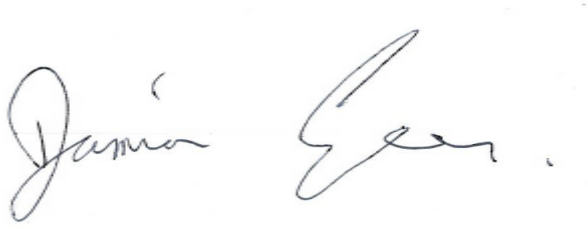
On 28 June 2013 the Government published *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System*. The plan provides a set of shared outcomes for all parts of the criminal justice system, which include commitments to increase public confidence, especially for victims and witnesses, and ensure the system is fair and just. The ambition is to make the system more responsive so that victims are provided with the right support and have a better experience of giving evidence.

As Policing, Criminal Justice, and Victims' Minister, I work across two Government departments and can look across the criminal justice system. I can see that the response to some crimes is simply not good enough and I am committed to making improvements. Sexual violence was identified as a key area requiring urgent attention and the Government established the national group on Sexual Violence Against Children and Vulnerable People. Both the work of this group and Transforming the CJS Strategy and Action Plan contain commitments to drive forward an ambitious programme of reforms to improve the response to sexual violence and the experience of victims.

On 30 June 2013 I announced a review that would look into ways to reduce the distress that some victims suffer during cross-examination in sexual violence cases, particularly where there are multiple defendants and barristers. In addition, the Government committed to consider the appointment of additional jurors in cases of child sexual exploitation and violence against women and girls. This would avoid victims being required to give evidence more than once by minimising the risk of disruption to trials. Both were actions in the Transforming the CJS Strategy and Action Plan.

This is a report on the main findings of the review and recommended actions that I have approved. I am grateful to the Lord Chief Justice and the Criminal Procedure Rule Committee, who have already indicated that they will amend the Criminal Procedure Rules to bring consistency to the appointment of additional jurors.

All these findings will be key initiatives in the next phase of our criminal justice reforms and continuing work on the response to sexual violence, to be delivered under the scrutiny of the Criminal Justice Board and national group on Sexual Violence Against Children and Vulnerable People.



Damian Green MP

Minister of State for Policing, Criminal Justice and Victims

Recommendations of the review

The eight recommendations of the review, relating to four areas identified as susceptible to reform are:

(i) Strengthening and improving case management and the conduct of trials

1.1 It is recommended that there should be consultation with the judiciary and prosecution and defence practitioners about whether the scope and use of Ground Rules Hearings (GRHs) could be widened to more/all sexual violence cases. Consideration should be given as to how to support this as a best practice approach with guidance, and reference to GRHs in relevant case management materials.

2.1 It is recommended that consideration be given to introduction of a trigger to ensure that all sexual violence cases are automatically identified for active and continuous case management, to help ensure that the focus is clearly on the needs of the victim throughout.

3.1 It is recommended that the rules of professional conduct be reviewed to identify inconsistencies and propose ways to align them for the purposes of trials of sexual violence cases.

(ii) Specialisation of courts and/or those involved in sexual violence cases

1.1 It is recommended that the bodies responsible for professional conduct and practitioners be encouraged and supported to develop an accreditation system for defence advocates that it is open and transparent.

(iii) Special measures and other arrangements for victims at court

1.1 It is recommended that the potential benefits of expanding the role of intermediaries should be examined, including consideration of the feasibility of doing so within the current legislative framework or by amendment of it, and an assessment of cost implications. This work should also consider the respective roles of intermediaries, Independent Sexual Violence Advisors (ISVAs) and other ‘supporters’ so that there is clarity on the role and purpose of each.

2.1 Pending the outcome of the pre-trial recording of cross-examination pilot it is recommended that further work be undertaken to raise awareness and encourage greater use of live links and other special measures that would enable victims and witnesses in sexual violence cases to give evidence and be cross-examined from outside of the court room.

3.1 It is recommended that the potential benefits of a further review should be considered once the outcomes of the pilot of pre-trial recorded cross-examination and other planned and ongoing programmes impacting on cases of sexual violence and /or child victims are known.

(iv) Codifying the appointment of 'reserve' jurors for the opening stage of sexual violence trials in some circumstances

1.1 It is recommended that there would be benefit in codifying the approach of appointing additional jurors for the opening stage so that judges have guidance about the steps to take, jurors can be informed and jury managers can take a consistent approach in managing the jury pool. In addition, the rule changes should also provide that, in appropriate cases, jurors should be empanelled at the end of the day before the start of the trial.

Introduction and summary

1. On 28 June 2013 the Government published a strategy and action plan – *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System* – to reform the criminal justice system. The plan provides a set of shared outcomes for all parts of the criminal justice system, which include commitments to increase public confidence, including among victims and witnesses, and ensure the system is fair and just. The ambition is to make the system more responsive so that victims are provided with the right support, including by endeavouring to ease the experience of giving evidence.

2. The plan acknowledges that the criminal justice system response to some crimes is simply not good enough and singles out three types of crime for specific action to ensure a more effective response from start to finish. One of those is violence against women and girls and child sex abuse, which can take many different forms. This paper reports on two key actions from the plan that focus on this type of case and improving the experience of victims involved in the trial process.

3. The Minister of State for Policing, Criminal Justice and Victims, Damian Green MP announced on 30 June 2013 that a review would be conducted to look into ways to reduce the distress that some victims suffer during cross-examination in trials of sexual violence cases, particularly where there are multiple defendants and barristers.[1]

4. In addition, the Government committed to consider the appointment of additional jurors in cases of child sexual exploitation and violence against women and girls to avoid victims being required to give evidence more than once by minimising the risk of trials having to stop and begin again.[2]

5. For the purposes of the review;

   - Officials met and obtained views and contributions from judicial office, legal professionals, the Victim Commissioner's office, the Crown Prosecution Service, senior law academics, the court service, and the third sector – see details at Annex A. In addition a literature review was conducted in order to tap into learning and research in relation to our criminal justice jurisdiction and others where cross-examination features.

   - To establish the case for additional jurors project a questionnaire was used to collate information from relevant parties about the frequency of disruption to Crown Court trials caused by jurors dropping out unexpectedly during proceedings which was circulated to jury managers, Presiding and Resident Judges, the criminal justice sub-committee of the Council of Circuit Judges, Chief Crown Prosecutors and the Virtual Defence Working Group.

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[1] Action 43 of Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System.

[2] Ibid, Action 44.

6. The *Sexual Violence Against Children and Vulnerable People* national group was also set up in 2013 (by the Home Office at the request of the Prime Minister) to identify and drive reforms in relation to the identification of and response (within the CJS and outside of it) to sexual violence, linking up the programme of work and initiatives that are already underway across Government to tackle these types of crime and bring perpetrators to justice. This work will feed directly into the work of the national group, particularly the workstream – Criminal Justice System: treatment of and response to victims – aiming to maximise the impact of work in the CJS concerning the treatment of and response to victims.

7. In addition, in its report '*Child sexual exploitation and the response to localised grooming*' of June 2013 the Home Affairs Select Committee called for reforms to ensure that victims are able to give clear and effective evidence in court. The Committee recommended that the MoJ introduce specialist courts (similar to the domestic violence courts currently in place) for child sexual abuse or sexual offences as a whole. This should take the form of experienced whole court teams in court and courtrooms equipped with the necessary technology. Aspects of the Committee's recommendations have been considered as part of the cross-examination review, which has looked across the trial process in cases of sexual violence generally.

Size and scope of the problems

8. The cross-examination review is in direct response to a number of cases that attracted attention and criticism, which involved adult and child victims of sexual violence who were left traumatised after trials. The process of cross-examination was a particular focus for commentators who condemned the nature, and manner of the questioning of victims, such as the use of poorly framed questions and repeating questions and points, and the duration of the process, elements which were most pronounced in cases involving multiple defendants and counsel.

9. Cross-examination is an integral part of our adversarial justice system. It is not founded in legislation and is a process that has evolved over time, and it is a key feature in proceedings before most courts and tribunals. The purpose of cross-examination is to test the reliability of the evidence being given by the parties and witnesses through putting challenging questions. Each party has an opportunity to put forward their position clearly to the other so that any dispute of facts is clearly understood and the opportunity to answer is afforded. Cross-examination tests the credibility of both the evidence being given and the person who is giving it.

10. In a recent article[3] the origins of cross-examination are explored. It is noted that it is generally believed that the format of the English criminal trial as we now recognise it came into being less than 300 years ago. The genesis of cross-examination is credited to a barrister, William Garrow, who was renowned in the late 1700's for his "aggressive style when addressing judges and cross-examining witnesses as he fought hard for prisoner's rights…". He was known to conduct lengthy cross-examination, using it to challenge witnesses, and other counsel inspired by his fearlessness and success followed his approach. The authors record that the adversarial justice system is associated with words such as confrontation, battle, fight and duel.

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[3] Cooper & Marchant '*Nobody really did that, did they': Is cross-examination about investigating the truth*? (2014) forthcoming.

11. There have been tragic examples of the need to find ways to reduce the distress that victims can suffer from cross-examination. Ms Frances Andrade (an adult complainant of 'historic' abuse) took her own life after giving evidence at the trial of her alleged abuser; three days before her death she texted her friend to say that after appearing in the witness box, she felt "raped all over again". The 'Oxford Case'[4] was a trial that lasted four months and involved six complainants (whose ages at the time they gave evidence ranged from 16 to 21 years) and nine defendants each represented by two counsel. Information provided by the Crown Prosecution Service noted that one of the victims gave evidence for two-and-a-half days, of which one-and-a-half days involved cross-examination on behalf of three defendants.

12. For the purposes of the review we have focused on trials of sexual violence cases that take place in the Crown Court, these being the most serious and complex cases that can involve lengthy trials of several weeks or months. The following table, based on published MoJ figures, shows that each year about 4000 defendants plead not guilty in Crown Court trials where a sexual offence is the most serious charge. This represents around 14% of all defendants pleading not guilty.[5]

Number of defendants (000s) tried at the Crown Court who pleaded not guilty by principal offence*

Year	2007	2008	2009	2010	2011	2012
Sexual offences	3.7	3.5	3.7	4.2	4.2	4.0
All offences	26.2	25.8	27.7	30.7	29.5	26.8
Share	14%	14%	13%	14%	14%	15%

Source: based on figures contained in table A3.15, *Criminal Justice Statistics Quarterly*, MoJ, December 2012.

* Excludes those not tried (i.e. committed for sentence, failed to appear, indictment to lie on file, unfit to plead, defendant died, etc).

From the available data we are not able to ascertain the age group of the victims at the time of the alleged offences and when the case comes to trial. Neither do the data provide information on the number of victims and defendants per trial, from which we might determine the number of counsel per case.

Figures published by the MoJ show that, in recent years, there were around 1,000 Crown Court trial hearings annually that were delayed due to the absence of a prosecution witness. It should be noted that this annual figure covers all offences tried in the Crown Court and the reasons for witness non-attendance are not recorded. However, it is possible that a proportion of these trial witnesses would have been victims in a sexual offences case and they failed to attend the trial hearing out of fear of the cross-examination or of the criminal justice process as a whole.[6]

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[4] Operation Bullfinch (Thames Valley Police) – An organised gang sexually exploited girls through grooming, prostitution and rape over six years. The outcome of the trial was that seven men were found guilty of fifty nine offences including rape, facilitating child prostitution and trafficking.

[5] Every effort is made to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

[6] Table 3.6, Key reasons for ineffective Crown Court trials in England & Wales, "Court Statistics Quarterly", MoJ, Q4 2013.

13. The scope of the cross-examination review spans a wide range of cases that are tried in the Crown Court under the umbrella term 'sexual violence', which includes offences charged under sexual offences legislation as well as other legislation that deals with abuse and exploitation of children and vulnerable people. Both current day and historical offending is included so that victims of all ages and types are considered, and we have not confined the review to those cases involving multiple offenders that emanate from large-scale investigations, as the issues that we have examined cut across all sexual violence cases.

14. The Crown Prosecution Service has reviewed a number of cases that involved multiple victims and/or defendants (such as Operation Retriever (Derbyshire), Operation Central (South Yorkshire), Operation Chalice (West Mercia), Operation Span (Greater Manchester), and Operation Bullfinch (Thames Valley)) using the case files maintained by prosecutors on which timings and details were recorded of the trial process.[7] From this information it is evident that any distress and trauma that victims might endure in trials of sexual violence offences by virtue of the very nature of the allegations under consideration, would be exacerbated in trials where there are multiple defendants, when cross-examination is protracted (lasting many hours and sometimes days) and repetitive (with several counsel covering the same issues with victims).

15. A factor said to contribute to the trauma for victims is the manner in which cross-examination is conducted. In trials of sexual violence offences victims are required to recount their ordeal and be challenged about personal and sensitive experiences and information. At present, section 41 of the Youth Justice and Criminal Evidence Act 1999 limits the potential to question a victim about their sexual behaviour outside of the specific incident. There have been examples of cases, reported by the press and media, where it is said that cross-examination was aggressive, with victims, for example, repeatedly being called a liar. However, although such cases appear infrequently they receive a significant amount of coverage and commentary. There is no evidence to show that inappropriately aggressive cross-examination is a widespread issue in sexual violence trials, involving multiple defendants or otherwise. Anecdotal evidence from practitioners and observers that we spoke to is that there are some examples of bad practice but generally practices are changing as experience and learning is showing that cross-examination is most effective when done in a non-aggressive way.

16. Prevailing themes emerged during the cross-examination review which led to the identification of areas that are susceptible to reform; **it is recommended** that further consideration is given to:

    (i) strengthening and improving case management and the conduct of trials;

    (ii) specialisation of courts and/or those involved in sexual violence cases;

    (iii) special measures and other arrangements for victims at court.

17. The experience of giving evidence at trial and being cross-examined will never be pleasant, but the prospect of having to go through the experience again would add to the distress for a victim, particularly in certain types of cases. At one of the roundtable meetings hosted jointly by the then Director of Public Prosecutions and the National

[7] This is not published information and we are grateful to CPS policy colleagues for sharing the analysis with the review team.

Policing Lead for sexual violence, the issue of reserve jurors was discussed. The Government subsequently committed to exploring the case for reserve jurors to be routinely appointed in sexual violence cases, to guard against a circumstance where evidence had to be given for a second time after a trial is abandoned due to lack of jurors.

18. We have looked at how frequently trials of violence against women and girls and child sexual abuse in the Crown Court collapse due to jurors dropping out, particularly where this occurs after the victim has given evidence. No evidence was found that such cases have collapsed during or after cross-examination, requiring a witness to give their evidence again. In the opinion of judges and legal practitioners to whom we spoke, if a trial is to begin again it will usually be apparent before the end of the prosecution's opening. One judge reported that, after this point, they will 'do anything they can to keep the trial going'.

19. Evidence was found of practices being developed by courts to guard against jurors dropping out of some cases, such as those scheduled to run for a long time. These systems have tended to involve the appointment of additional jurors for the length of the prosecution's opening, after which they will be discharged and returned to the pool (although the mechanics of this has varied from court to court). **It is recommended** that there would be benefit in:

    (iv) codifying the appointment of 'reserve' jurors for the opening stage of sexual violence trials in some or all circumstances.

Potential areas for reform

(i) Strengthening and improving case management and the conduct of trials

20. Cross-examination is a critical part of criminal trials, but it is not something that just happens on the day. For it to be done well and fairly, the case and the parties to it need to be properly prepared. This can be achieved through effective case management, by the parties and the court, guided by criminal procedure rules,[8] practice directions and other guidance, engaging actively to resolve issues and plan towards trials to ensure that they can proceed, in a timely way, and with everything in place to ensure that each side can present its best case.

21. The case management function is carried out at court hearings such as preliminary hearings or plea and case management hearings, which occur at different stages in the process to get cases ready for trial. The effectiveness of these hearings can depend on matters such as timing in terms of the preparedness of the parties and the case, the amount of time and attention devoted to them, and to some extent on whether the judge and parties at such hearings will be those involved with the trial itself in due course.

22. Features of active and effective case management include the early identification of the real issues; the early identification of the needs of witnesses; achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case; monitoring of progress of the case and compliance with directions; ensuring that evidence, whether disputed or not, is

[8] Part 3 Criminal Procedure Rules.

presented in the shortest and clearest way; discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings; encouraging the participants to co-operate in the progression of the case; and making use of technology.

23. There is a new type of case management hearing, Ground Rules Hearings (GRHs), which are designed to facilitate a more 'intense' consideration of issues in certain types of cases. *Guidelines on Prosecuting Cases of Child Sexual Abuse*[9] explain that ground rules hearings are currently *required* in any case in which an intermediary is appointed[10] and are *good practice* in any case in which there is a young witness.[11]

24. GRHs effectively lay down the 'ground rules' for the conduct of the trial. The trial judge and advocates discuss how victims and witnesses are to be questioned and other related matters. This may include the defence agreeing who will be the lead counsel to put questions to the victim in cases with more than one defendant, and the length of time given to the cross examination. The ground rules hearings should take place in advance of the day of the trial so that everyone, particularly the victim, is aware of what to expect, and how long the proceedings in court should take, and to consider and arrange special measures as far as possible in advance of the trial.

25. A GRH toolkit is on the Advocates Gateway website www.theadvocatesgateway.org.[12] A revised toolkit is now available on the website titled '*Ground Rules Hearings: Planning to question a vulnerable person or someone with communication needs*'. The revision broadens the category of witnesses to whom it applies. The GRH toolkit also addresses widespread concerns regarding the length of the hearing by introducing limits where 'necessary and appropriate'.

26. Rule 3.8(4) of the Criminal Procedure Rules[13] among other things requires the court to 'take every reasonable step to facilitate the participation of any person'. That includes discussions of ground rules for the questioning of witnesses, and for the conduct of the trial, in every case in which the court judges that necessary or desirable. The Criminal Practice Directions given by the Lord Chief Justice contain, at paragraph I 3D and following, detailed guidance on the treatment of vulnerable witnesses in all cases, and detailed directions for the conduct of ground rules discussions, which guidance and directions supplement that rule.

27. The form of application for a special measures direction which is authorised by the Lord Chief Justice for use in connection with Part 29 of the Criminal Procedure Rules refers explicitly to the need for ground rules discussions where a direction is given for the questioning of a witness through an intermediary, under section 29 of the Youth Justice and Criminal Evidence Act 1999.

28. The magistrates' courts trial preparation form, authorised by the Lord Chief Justice for use in connection with Part 3 of the Criminal Procedure Rules, at paragraph 13.8 includes an explicit prompt for the court to consider directing the conduct of a ground rules discussion in any case. The Crown Court plea and case management hearing

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[9] Published by the Crown Prosecution Service in October 2013.

[10] Part F.1, Application for a Special Measures Direction.

[11] Section 5.1, Judicial College Fairness in Courts and Tribunals 2012.

[12] This is hosted by the Advocacy Training Council and was launched by the Attorney General in April 2013.

[13] Part 3 Criminal Procedure Rules.

questionnaire, likewise authorised for use by the Lord Chief Justice, at paragraph 18 and following includes detailed questions about the treatment of witnesses which must be considered in every case by advocates and the courts.

29. There is no data about the number of GRHs being held, whether on the mandatory or best practice basis, or about their effectiveness in ensuring that issues and needs of child victims are taken into account in case management. However, many of those who contributed to the review (including academics and commentators, practitioners, and third sector representatives), highlighted the potential of ground rules hearings, if used effectively, to make a real difference in terms of addressing issues relating to cross-examination in advance of the trial, which would help to reduce the distress that victims and witnesses can suffer.

    It is recommended that there should be consultation with the judiciary and prosecution and defence practitioners about whether the scope and use of Ground Rules Hearings (GRHs) could be widened to more/all sexual violence cases. Consideration should be given as to how to support this as a best practice approach with guidance, and reference to GRHs in relevant case management materials.

30. In terms of ensuring that sufficient attention is paid to case management of more/all sexual violence cases, including the greater use of GRHs, it is suggested that consideration be given to having a trigger to ensure that all sexual violence cases are flagged as they enter the criminal justice system for enhanced attention throughout the process. This would also help ensure that entitlements under the Code of Practice for Victims (Victims' Code)[14] and Witness Charter, and to legislation regarding who special measures are available for are considered and applied as appropriate and in a timely way. We would also consider whether there should be an assumption that special measures will be required in sexual violence cases; by assuming that they are needed rather than that they may be required and would require greater consideration to be given to the needs of victims as well as to their own wishes. For example, section 22A of the Youth Justice and Criminal Evidence Act 1999 currently applies to adult complainants in sexual offence cases in the Crown Court, and includes a presumption that pre-recorded evidence in chief will be admitted where this is requested. However that presumption doesn't apply to each of the special measures.

    It is recommended that consideration be given to introduction of a trigger to ensure that all sexual violence cases are automatically identified for active and continuous case management, to help ensure that the focus is clearly on the needs of the victim throughout.

31. The need for cultural change in the court room has been the resonating feedback throughout the review. As regards cross-examination during trials, there are published guidelines, case law and Criminal Procedure Rules[15] which provide directions on appropriate style and level of questioning. Ground rules hearings in

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[14] Published 29 October 2013 and effective from 10 December 2013.

[15] Achieving Best Evidence in Criminal Proceedings **-** Guidance on interviewing victims and witnesses, and guidance on using special measures published by the Ministry of Justice (2011); *R v F* [2013] EWCA Crim 424, R v W and M [2010] EWCA Crim 1926; R v Wills [2011] EWCA Crim 1938 and R v E [2011] EWCA Crim 2028. Criminal Procedure Rules.

particular look to consider pre-trial issues relating to how cross-examination will actually occur, including timetabling, appointing lead counsel in multiple defendant cases, and ensuring special measures to safeguard victims and witnesses going through the court process. The management and control of the trial itself is a matter for the judge, who is responsible for ensuring fairness to both parties.

32. One of the suggestions raised during our review which could contribute to bringing about change in conjunction with other steps such as greater use of GRHs, is to standardise relevant Codes of Conduct and professional requirements for the legal profession. The former Lord Chief Justice in the case of *Farooqi* in 2003[16] acknowledged that the various rules of professional conduct are not consistent and should be made so. Furthermore professional advocacy standards do not support the making of complaints when advocates ignore rules or repeatedly breach judicial interventions during questioning.

    It is recommended that the rules of professional conduct be reviewed to identify inconsistencies and propose ways to align them for the purposes of trials of sexual violence cases.

(ii) Specialisation of courts and/or those involved in sexual violence cases

33. In its report *Child sexual exploitation and the response to localised grooming*[17] the Home Affairs Select Committee described the experience of reliving incidents in a court as inevitably harrowing for witnesses and called for reforms to ensure that victims are able to give clear and effective evidence in court. The Committee made a series of recommendations, identifying the need for specific guidance and training of the judiciary, barrister and solicitor advocates (in particular as to whether the cross-examination of complainants in multiple defendant cases should be controlled including through allocation of issues between counsel and time limits). It also proposed that the Ministry should consider introducing specialist courts (similar to the domestic violence courts currently in operation) for child sexual abuse or sexual offences as a whole. Such specialist courts might take the form of experienced whole court teams in designated court rooms equipped with the necessary technology and appropriate access and waiting facilities. The Government response[18] to the Home Affairs Committee committed to considering the concept of specialist courts in taking forward the review of cross- examination.

34. Calls to establish specialist courts, for very vulnerable witnesses and to hear cases involving abuse or harm to children, have also been made during the passage of the Crime and Courts Act 2013 and the Children and Families Bill currently before Parliament. The Government resisted the tabled amendments given the significant amount of work underway and future plans to improve the system as a whole for victims and witnesses.

35. The Sexual Violence against Children and Vulnerable People national taskforce has a workstream *Victims in the Criminal Justice System* which has identified the courtroom experience as one of five keys areas for attention and activity. It will assess actions being taken and proposals for reform and consider whether they

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[16] [2013] EWCA Crim 1649.

[17] HC 68-1, published 10 June 2013.

[18] Published 10 September 2013.

produce a response that is as holistic and effective as that which might be offered by a specialist court model. Among the current actions is the work covered by this paper on cross-examination and use of additional or reserve jurors to minimise the risk of retrials, and other actions from *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System*.

36. The specialist courts that the Home Affairs Committee referred to are Specialist Domestic Violence Courts (SDVCs). These are a partnership and problem solving specialised approach to dealing with domestic violence cases in magistrates' courts. A Programme led by a National Steering Group has co-ordinated rollout of SDVCs over the last ten years and there will be 137 SDVCs when the accreditation of three sites finishes in 2014. The partnership includes specially trained police, prosecutors, magistrates and District Judges, and legal advisers, the probation service and specialist support services such as Independent Domestic Violence Advisers (IDVAs). Listing arrangements cluster cases into specialist dedicated court sessions and/or fast track hearings so that agencies can provide necessary resources, and there are separate entrances and waiting areas for victims and defendants to reduce risk of further incidents. The courts have links to perpetrator programmes as well as multi-agencies such as health and social authorities.

37. There would be limitations to using the model of SDVCs for other types of cases as they were developed to operate in relation to high volume offences (across England and Wales) that are prosecuted, tried and completed in magistrates' courts. The types of cases of sexual violence that prompted this review and on which it has focused are those that are so serious and complex that they are tried in the Crown Court; they do not occur in high volume compared with other types of offences tried in the Crown Court. The former Lord Chief Justice, in the judicial response[19] to the Home Affairs Committee's report considered that the proposal for specialist courts could lead to unintended consequences, such as greater waiting times if venues were limited to specialist centres that would limit courtrooms, judges and staff able to deal with the cases.

38. Across the range of contributors to the cross-examination review the overriding view was that a great deal has been done, is in train or is under consideration across Government and everyone involved in and linked to the criminal justice system, to improve the way that cases and trials of sexual violence involving children and vulnerable people are dealt with. There was support for the desired outcome outlined by the Home Affairs Committee of enabling victims and witnesses to give clear and effective evidence, their best evidence, during the trial process. However, as opposed to setting up a system of specialist courts within the Crown Court, it was suggested that educating/training and embedding specialisation, particularly of those involved in trials of such cases, joined with other improvements already made or planned would help achieve that outcome.

    We do not recommend further consideration of specialist courts.

39. One of the potential benefits of 'specialist courts' for child sexual abuse cases or for all sexual violence cases, would be the ability to join everything up and provide a wrap-around service strongly oriented around the victim and witnesses. For example Scandinavian jurisdictions have 'children's houses' which act as a one stop shop for

[19] Letter from the Lord Chief Justice to the Right Honourable Keith Vaz MP of 26 July 2013.

child victims that isn't at the court room, but from which the child can give evidence. All other services including medical, counselling/interviewing are also carried out in the bespoke facility. To introduce such a system would require a new National Programme to develop, test and implement a model.

40. An alternative approach might be to devise a less formal approach that 'flags' cases at a very early stage that should be given special attention by all, to ensure that they are progressed and actively managed through all stages of the criminal justice system, and by people who are specialised. This links back to section (i) above and ensuring effective case management.

41. Work and improvements already underway include:

- **The court environment**

The Victims' Code sets out enhanced entitlements for victims of the most serious crime (including sexual offences), vulnerable or intimidated victims and persistently targeted victims, because they are more likely to require enhanced support and services through the criminal justice process. Victims are entitled to an assessment to identify any needs or support required, which might include special measures to help them give their best evidence in court.

HMCTS is providing training to increase staff awareness of the issues involved in sexual violence cases. There is a programme underway to put Witness Champions in place who will be leads for all victims and witnesses related work in each region and will be responsible to each Regional Delivery Director on compliance with the Code of Practice for Victims (see below). The champions will also ensure a closer relationship with witness care units and will liaise with Police and CPS locally to ensure more a dedicated service. Their role will include responsibility for ensuring that where it is required electronic equipment (such as playback equipment for the recorded evidence of children and other vulnerable witnesses) is in place and working prior to trials commencing. As regards court facilities there is a Digital Reform programme in train to improve IT and digitalisation of courts which should be implemented by 2016.

- **Prosecutors**

The Crown Prosecution Service has set up a network of specialist prosecutors and only advocates from the panel can be used to prosecute child sexual abuse cases. There is a clear competency framework and there are different levels of accreditation which determine the types of case that can be allocated to advocates. The Director of Public Prosecutions recently published comprehensive *Guidelines on Prosecuting Cases of Child Sexual Abuse*[20] following a public consultation. The guidelines have a section on the support that should be given to victims and witnesses in court, setting out relevant requirements guidance about the role of the prosecutor in managing the case and in the conduct of the trial, including as regards cross-examination.

- **The judiciary**

Presently, all judges who try defendants accused of serious sexual offences go through an authorisation process to ensure that they have sufficient experience and the necessary expertise to undertake these cases – ticketing. If selected, the judge undergoes comprehensive training before he or she is permitted to sit on cases of

[20] October 2013.

this kind; the specialist education that every judge who tries these cases receives is supplemented thereafter by refresher training.

In his response to the Home Affairs Committee report, the former Lord Chief Justice announced steps for judges to be selected and approved on a case-by-case basis for certain sexual violence and abuse cases, and the provision of bespoke training for those judges. The new steps will provide for judges to be selected and approved on a case-by-case basis for certain serious sex and other cases involving witnesses who are significantly vulnerable, and the provision of bespoke training for those judges. It is understood that work to develop the bespoke training is proceeding well with a view to it being delivered in early 2014.

The judiciary is also concerned about timeliness of sexual violence cases involving young and vulnerable witnesses. Judicial Office has conducted some work on behalf of the Lord Chief Justice to examine why cases are taking so long to get to trial and to a conclusion. In addition, an initiative to get cases involving very young victims to trial in a shortened timeframe is under consideration.

- **The defence**

The range of training and materials available to all advocates in relation to dealing with cases involving vulnerable witnesses, including cross-examination, has developed considerably in recent years. Many of the academics and commentators that we spoke with are contributing directly to training courses, such as the 'Keble' advocacy training week on the South Eastern Circuit in England which now devotes two days to examining vulnerable witnesses, and to materials and guidance that are being developed for advocates and judges in relation to understanding and dealing with young and vulnerable witnesses available through the Advocates' Gateway.[21] The Bar Council and Law Society have announced a new initiative to train defence lawyers on cases involving vulnerable witnesses.

However, unlike for prosecutors and judges there is no system in place for the accreditation of advocates acting for the defence. Barristers and Solicitor Advocates are able to act for the prosecution or defence, so they may be accredited if they apply to join the CPS specialist panel. If they do not, there is no way at present to require them to undertake training or demonstrate their capability to undertake cases involving vulnerable witnesses. The Bar Council and Law Society advised that the best approach would be to encourage advocates to undertake training of their own volition, acknowledging that they need to know as much and be as competent as the judges and prosecutors who are accredited – they could then use the fact that they have been trained to attract work to their practice. However, this would not be transparent and there would be no apparent process for ensuring that the specialist expertise is gained and maintained by individual advocates.

It is recommended that the bodies responsible for professional conduct and practitioners be encouraged and supported to develop an accreditation system for defence advocates that it is open and transparent.

[21] www.theadvocatesgateway.org

(iii) Special measures and other arrangements for victims at court

42. The Youth Justice and Criminal Evidence Act 1999 provides for special measures to be available for young and vulnerable victims and witnesses at court. Used effectively, special measures should improve the support given to vulnerable and intimidated victims/witnesses in order to assist them to give their best evidence in court, and should also help to relieve some of the stress associated with giving evidence. A summary of current special measures in place is provided below. It should be noted that the special measures are not specific to sexual violence cases only.

43. The legislative special measures include:

- screens – so that the witness does not have to see the defendant(s) or be seen;
- live link – allowing a witness to give evidence from outside the courtroom, including away from the trial court, to ensure that the witness is able to give their best evidence;
- a supporter in the live link room;
- video-recorded evidence-in-chief – allowing an interview with the witness, which has been video recorded before the trial, to be shown as the witness's evidence-in-chief;
- evidence given in private – clearing the court of most people in sexual offence or witness intimidation cases (legal representatives and certain others must be allowed to remain);
- removal of wigs and gowns by judges and advocates;
- an intermediary – allowing an approved intermediary (a communications specialist) to help a vulnerable witness to communicate with the police, legal representatives and the court:
- aids to communication – allowing a witness to use communication aids such as a symbol book or alphabet boards; and
- video-recorded pre-trial cross-examination. The legislation came into force partially in three Crown Court locations on 30 December 2013.[22]

44. In addition to the legislative special measures for vulnerable and intimidated witnesses, other arrangements can be made to provide additional support before and at the trial including pre-trial court familiarisation visits and appropriate arrangements for breaks to take into account children's greater tendency to tire and their reduced concentration span compared with adults.

45. Generally child and vulnerable victims are considered automatically eligible under section 16 of the 1999 Act. All complainants of sexual offences are considered intimidated and also have automatic eligibility under section 17(4). As mentioned previously, section 22A includes a presumption applicable in sexual offences cases

[22] Section 28 of the Youth Justice and Criminal Evidence Act 1999 allows for recorded pre-trial cross-examination of vulnerable and intimidated. Piloting this legislation is action 40 of STraP and on 11 June 2013 the Justice Secretary announced the plan to pilot this provision in three Crown Court locations – Liverpool, Leeds and Kingston-Upon-Thames. The pilots will run for six months followed by an assessment period.

heard in the Crown Court that pre-recorded evidence will be admitted where this is requested. It is however important that child and vulnerable witnesses are identified at an early stage so that investigators can establish whether they are likely to qualify for a special measures direction under the 1999 Act, taking account of the circumstances, the expressed wishes of the witness and the observations of anybody involved in the witness's care.

46. The Code of Practice for Victims of Crime[23] places obligations on the police to take all reasonable steps to identify vulnerable or intimidated victims. Under the Code, these witnesses are entitled to an enhanced level of service. An application for special measures must be made to the court, and it is the duty of the court to ensure that the special measure is in place on the day of the hearing to enable the victim/witness to give evidence.

47. There is no available evidence about the take up and use of special measures in sexual violence cases or generally in those cases in which victims and witnesses might be entitled to them. The Home Affairs Committee identified[24] failure of special measures to be implemented correctly as a cause for concern, having received evidence of difficulties. The NSPCC cited issues around delay, poor questioning, inadequate assessment and insufficient consideration of appropriate special measures. Victim Support highlighted failures with special measures such as screens being forgotten and technical errors occurring. In relation to the cross-examination review, Crown Court judges (contributing via HM Council of Circuit Judges Criminal sub-Committee) reported that problems with IT and equipment were a significant problem and suggested that investment in improving IT and live link facilities could help alleviate distress to victims in sexual violence cases, including from the delay that such problems cause during trials.

48. The Ministry of Justice is currently working to improve awareness of special measures and support services, and to promote greater use of them.[25] In addition, the CPS is improving guidance about special measures, particularly in cases of child abuse, and there are toolkits and materials available on the Advocates' Gateway[26] about availability and use of them. HMCTS has a programme to introduce regional Witness Champions who will be responsible for liaison with the CPS and police witness care units about special measures, and the Treasury has set aside £160m for a programme to modernise and digitalise courts. These initiatives together should, over time, satisfy the Home Affairs Committee's misgivings.

49. Of all the available special measures, in the context of sexual violence cases and the cross-examination review, the greatest area of concern was the purported under-use of registered intermediaries by the police and CPS, and the courts.

50. Legislation[27] provides for the use of intermediaries in criminal trials to assist vulnerable witnesses with communication difficulties to give their best evidence in court. They are officers of the court and their function is to act as a *conduit* in order

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[23] Published 29 October 2013 and effective from 10 December 2013.

[24] In its report HC 68-1 on child sexual exploitation and the response to localised grooming published 10 June 2013, at paragraphs 87–88.

[25] Action 39 of Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System.

[26] www.theadvocatesgateway.org

[27] Section 29 of the Youth Justice and Criminal Evidence Act 1999.

that communication between the court and a witness may be as complete, coherent and accurate as possible. In essence the intermediary performs a relatively passive 'interpreter' function by, if required, 'reinterpreting' complex language into a more accessible form, as well as explaining a witness's answer to the court, to enable both to be understood.

51. All witnesses who are considered vulnerable can get help from an intermediary; a vulnerable witness[28] is someone who is less than 18 years old, or whose evidence would be diminished in quality because they have a mental disorder (within the meaning of the Mental Health Act 1983), a learning disability (significant impairment of intelligence and social functioning) or a physical disability or physical disorder.

52. In order to make a direction allowing the use of an intermediary, the court must decide that help with communication and/or understanding will improve the witness's quality of evidence. Approval can be retrospective where an intermediary was used during an investigation. Similar to other forms of special measures, an application may be made by prosecution or defence, or be instigated the court.

53. The revised Victims' Code requires the police to appoint a suitably trained professional to conduct interviews with victims in a way that considers their needs and views and takes into account factors such as the need for a registered intermediary to help them to communicate their evidence effectively.

54. Intermediaries engaged through the Witness Intermediary Scheme will undertake an assessment of the witness's communication abilities and needs at an early stage in the proceedings, and produce a written report for the judge, the prosecution and the defence. This report should highlight matters such as limited concentration spans and particular types of questioning that should be avoided.

55. We know that since the legislation providing for intermediaries was brought into force in 2004 they have been used in 6000 cases. We do not know whether this represents a small or large proportion of sexual violence cases in that nine year period that involved child or vulnerable victims who might have been eligible for this special measure. Academics and others who have observed and researched sexual violence trials suggested to us an under-use of intermediaries in such cases. However, it is not clear to them why any such under-use may exist. It may be due to a lack of awareness about the availability of intermediaries and the role that they can play, it might be a case of parties not properly understanding the needs of the victim/witness, or it may be an issue of cost affecting whether an intermediary is sought at all and to what extent they are then used in a case.

56. Of the people that we spoke to for the purposes of the review who had had experience of working in cases where an intermediary was used or had observed or researched such cases, the view was that registered intermediaries provided through the Witness Intermediary Scheme delivered an important and high quality service, without which many vulnerable victims and witnesses would not be able to give their best evidence. There was strong support for getting a better understanding of whether intermediaries are being used fully in cases of sexual violence, and if not why not, and of promoting better understanding of what they can do for victims and witnesses in sexual violence cases.

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[28] Ibid, section 16.

57. In addition to greater use of intermediaries in sexual violence cases, several of the academics and commentators that we spoke with called for work to be done to consider innovative ways to use the skills of intermediaries, potentially within the legislation as it stands. Attention was drawn to the potential use of intermediaries in a proxy or interlocutory role, a system that is used in non-adversarial systems in countries such as Norway. The Advisory Report on Video Evidence 1989 (the Pigot Report) recommended that intermediaries could be used as interlocutors and the view of some is that the wording of section 29 of the Youth Justice and Criminal Evidence Act 1999 would enable this.

58. Independent Sexual Violence Advisers (ISVAs) form part of the wider tapestry of support to victims of sexual violence. They are trained specialists, often working for charities, who can provide more pastoral care and advice to victims and witnesses. We heard from several of the people to whom we spoke that there is a lack of clarity about the role of ISVAs, social workers, the court-based Witness Service and others whose role is to provide support beyond the witness box. While the role of the intermediary is generally understood within the CJS, there is a lack of consistency about how supporters are treated, and no national guidance on the role of ISVAs.

    It is recommended that the potential benefits of expanding the role of intermediaries should be examined, including consideration of the feasibility of doing so within the current legislative framework or by amendment of it, and an assessment of cost implications. This work should also consider the respective roles of intermediaries, Independent Sexual Violence Advisors (ISVAs) and other 'supporters' so that there is clarity on the role and purpose of each.

59. Many of the people that we spoke with, including practitioners and academics, were interested in the forthcoming pilot of pre-trial recorded cross-examination. This is the last of the legislative special measures developed following the Pigot Report to be tested and implemented, and the Home Affairs Committee called for immediate implementation of the scheme by January 2014 in its report on child sexual exploitation. Concerns were expressed that the pilot will not enable flexible and creative testing of the provision, as current plans are to base the scheme in the courtroom environment rather than using facilities away from a court house, and it will not be possible to combine pre-trial recording of cross-examination with testing of development of other special measures such as an intermediary being used in a different way (as discussed in paragraph 57 above).

60. Academic contributors to the review, some of whom are involved in developing key toolkits, guidance and materials to improve knowledge and understanding about dealing with young and vulnerable victims and witnesses in sexual violence cases, emphasised the need for witnesses to be able to give evidence/be cross-examined away from the courtroom, as this is a key factor in reducing stress and distress. This is a theme that the former Lord Chief Justice, Lord Judge, took up,[29] arguing that child victims do not need to be physically present in the court, and if full technology is introduced in such cases there would be a powerful case for it to apply to other victims, particularly of sexual offences.

[29] Delivering the Bar Council's annual law reform lecture, The Evidence of Child Victim: the Next Stage, on 21 November 2013.

Pending the outcome of the pre-trial recording of cross-examination pilot it is recommended that further work be undertaken to raise awareness and encourage greater use of live links and other special measures that would enable victims and witnesses in sexual violence cases to give evidence and be cross-examined from outside of the court room.

61. In his Annual Law Reform lecture Lord Judge suggested that if the system cannot adjust to such practices, the UK's long tradition of adversarial justice may need to be reviewed. Others that we spoke with, notably the academics, suggested that there would be benefits in commissioning a new Pigot-type Report, to examine:

    - potential reform of the adversarial system,
    - whether steps could be taken to address the seeming inequality of arms for victims (whose interests are not represented by the prosecution and they are not parties to the proceedings),[30]
    - the practice and ethics of cross-examination of vulnerable witnesses and whether there should be standards, and
    - the range and scope of special measures to safeguard young and vulnerable witnesses.

    It is recommended that the potential benefits of a further review should be considered once the outcomes of the pilot of pre-trial recorded cross-examination and other planned and ongoing programmes impacting on cases of sexual violence and /or child victims are known.

(iv) Codifying the appointment of 'reserve' jurors for the opening stage of a trial in some circumstances

62. An evidence-gathering exercise was conducted to consider the extent to which the appointment of additional jurors would avoid victims of violence against women and girls/child sexual exploitation having to give evidence more than once. Jury managers, the Criminal Justice sub-committee of the Council of Circuit Judges, Presiding and Resident Judges, Chief Crown Prosecutors and the Virtual Defence Working Group responded to a questionnaire about how frequently trials collapse due to jurors dropping out – particularly where this happens after the victim has given evidence.

63. The exercise did not find any anecdotal evidence that it is common for trials of cases of the type in question to collapse after cross-examination has taken place as a result of juror attrition. However, responses to the questionnaire showed that judges are alive to the risk of some trials, particularly those listed to run for some time, not being able to proceed as planned.

64. Another practice identified is of courts empanelling jurors at the end of the day, informing them about the likely length of the trial and giving them overnight to consider their ability to sit for the duration of the trial. This could avoid the problem of

[30] EU Directive 2012/29 provides a right to legal assistance to victims whose national law gives them the status of parties to criminal proceedings (which excludes the three jurisdictions of the UK). The concept of Independent Legal Representation for victims is relatively well established in different formats in continental European countries, including France, Belgium, and Italy, and is in operation in Ireland, and Canada. These models have been shown to be not incompatible with adversarial proceedings.

jurors dropping out once a case is underway and might also be helpful where there is a risk that jurors will drop out due to the nature of the offences to be tried.

65. This exercise did not find any justification for taking steps to avoid the possibility of disruption to trials as a matter of course. However, the emerging good practices of appointing additional jurors in some cases or keeping additional jurors beyond the prosecution opening of a trial could be more widely used to reduce the risk of disruption to trials where the judge sees fit.

    It is recommended that there would be benefit in codifying the approach of appointing additional jurors for the opening stage so that judges have guidance about the steps to take, jurors can be informed and jury managers can take a consistent approach in managing the jury pool. In addition, the rule changes should also provide that, in appropriate cases, jurors should be empanelled at the end of the day before the start of the trial.

66. It should be noted that the Criminal Procedure Rule Committee has consulted on proposals to codify the existing practice of appointing additional jurors and has already reached some conclusions. They adopted a rule permitting the selection of additional jurors where the trial was expected to last for more than 4 weeks, subject to review in due course. In effect, additional jurors could be retained in a case involving an anticipated long trial and would be retained only for the duration of the prosecution opening. The additional jurors will fill any vacancy arising from the discharge of one of the first 12 jurors in order of their own selection from the panel. Additionally, the Committee endorsed a new rule that jurors will be warned in advance of a long trial and then leaving it overnight before swearing them in, so as to give them a chance to excuse themselves if necessary.

Annex A – Contributors to the review

Law Society

Bar Council

HMCTS

Ministry of Justice

Secretariat to the Criminal Procedure Rule Committee

Office of the Victims' Commissioner

HM Council of Judges, Criminal Committee members

Crown Prosecution Service

Judicial Office

Natcen

Victim Support Witness Service

Joyce Plotnikoff and Richard Woolfson – Lexicon

Professors John Spencer and Michael Lamb – Cambridge University

Professor Penelope Cooper – Kingston University and Advocacy Training Council

Emily Henderson – New Zealand

Other things considered

Correspondence, including from criminal practitioners

BBC Radio 4 Programme 11 September 2013 on cross-examination

Press/media coverage of trials and documentaries about particular cases

Nbresearch, Dr Nina Burrowes "Responding to the challenge of rape myths in court. A guide for prosecutors" – March 2013

Code of Practice for Victims of Crime – October 2013

CPS Guidelines on Prosecuting Child Sexual Abuse – October 2013

Criminal Procedure Rules

2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings – October 2013

Victim Support research "Out of the Shadows: Victims' and Witnesses' experiences of attending the crown court" and "At risk, yet dismissed" – October 2013

Article by Professor Penelope Cooper, Kingston University and Advocacy Training Council and Ruth Marchant, Triangle: '*Nobody really did that, did they': Is cross-examination about investigating the truth*? (2014) – forthcoming

Actions from the Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System

Action	
39	Improve the consistency and take-up of special measures for vulnerable and intimidated witnesses.
40	Pilot Section 28 of the Youth Justice and Criminal Evidence Act 1999, which provides for pre-recorded cross-examination of a vulnerable witness in three courts – Leeds, Liverpool and Kingston-upon-Thames – starting in late 2013.
42	Consider the extent to which extra or reserve jurors could be used in these cases to take the place of any jurors who have to be discharged during the trial, so as to minimise the risk of having to stop and begin again.
43	Review how we might reduce the distress caused to some victims by cross examination, particularly where there are multiple defence barristers.